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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1225

CITY OF NEW ORLEANS, ET ALS.,
Petitioners

versus

NEW ORLEANS FIREFIGHTERS ASSOCIATION, LOCAL 632, ET ALS.,
Respondents

CONSOLIDATED WITH

CITY OF NEW ORLEANS, ET ALS.,
Petitioners

versus

NEW ORLEANS FIREFIGHTERS ASSOCIATION, LOCAL 632, ET ALS.,
Respondents

Petition for Writ of Certiorari to the Supreme Court of Louisiana

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IN THE

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OCTOBER TERM, 1972

No. .....

CITY OF NEW ORLEANS, ET ALS.,
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Respondents

CONSOLIDATED WITH

CITY OF NEW ORLEANS, ET ALS.,
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NEW ORLEANS FIREFIGHTERS ASSOCIATION, LOCAL 632, ET ALS.,
Respondents

Petition for Writ of Certiorari to the Supreme Court of Louisiana

---

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES OF AMERICA AND THE CHIEF JUSTICE AND ASSOCIATE JUSTICES THEREOF:

City of New Orleans and the various public officials, petitioners herein, seek a Writ of Certiorari to review a final decree of the Supreme Court of Louisiana, rendered on the 6th of November, 1972 (Appendix, pp. K-1), affirming the judgments of the Civil District Court for the Parish of Orleans, State of Louisiana, and the judgments of the Court of Appeal for the Fourth Circuit, State of Louisiana, granting mandamus judgments and contempt judgments, and in connection therewith, respectfully submit the following:

A

OPINIONS BELOW

The opinions and decrees of the Civil District Court for the Parish of Orleans (Appendix C-1, D-1, E-1, F-1, G-1, H-1, I-1, and J-1) have not been reported.

The judgments of the Court of Appeals for the Fourth Circuit of Louisiana have been reported at 230 So.2d 326, and 260 So.2d 779. Rehearings were denied and these denials are reported at 230 So.2d 326 and 260 So.2d 779.

The judgment of the Supreme Court of Louisiana denying the application for Writs of Certiorari is reported at 255 La. 557, 232 So.2d 78, and the judgment on the Writ of Certiorari is reported at ..... La. ....., 269 So.2d 194. (Appendix, pp. K-1) Rehearing was denied at ..... La. ....., 269 So.2d 194. Judgments granting the Writ of Certiorari were rendered on 29 June, 1972, 262 La. 452 and 453, 263 So.2d 721 and 722.

B

JURISDICTION

(a) The abovementioned final decree of the Supreme Court of Louisiana was entered on November 6, 1972.

(b) Rehearing was applied for and denied on December 11, 1972.

(c) On the 15th day of February, 1973, an order was rendered granting supersedeas and stay of the judgment of November 6, 1972.

(d) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) because the decisions rendered by the Civil District Court for the Parish of Orleans, State of Louisiana, and affirmed by the Louisiana Court of Appeals for the Fourth Circuit, and affirmed by the Supreme Court of Louisiana, involves a title, right, privilege or immunity claimed under the Constitution of the United States.

C

QUESTION FOR REVIEW

The question presented for review is:

May the State Courts of Louisiana enforce a mandamus against the City of New Orleans and the officers of the City of New Orleans to compel them, under penalty of their liberty, to enforce a statute of Louisiana

that is contrary to the Constitution of Louisiana or is such the denial of the officers' liberty under the due process and equal protection of the 14th Amendment?

D

LAWS INVOLVED

Louisiana Revised Statutes, Section 33:1996, as amended, Volume 20, p. 22, Appendix N-1.

Louisiana Revised Statutes, Section 33:1992, as amended, Volume 20, p. 17, Appendix M-1.

Constitution of Louisiana of 1921, as amended, Article XIV, Section 15 (I), Volume 3, pages 95 to 99, Appendix L-1.

E

STATEMENT OF THE CASE

This matter originated as a mandamus action in the State Court, the Civil District Court for the Parish of Orleans, State of Louisiana, by New Orleans Firefighters Association, Local 632, and by other persons, hereinafter referred to as "Firefighters", to compel the City of New Orleans and several officers of the City hereinafter referred to as "City", to compel City to pay over to Firefighters, benefits claimed to be due them under Louisiana Revised Statutes (R.S. 33:1996) and Louisiana Revised Statutes (R.S. 33:1992). Trial was had and the mandamus judgments issued. These judgments are not reported. See Appendices C-1, D-1, E-1, F-1. These judg-

ments were appealed to the Court of Appeals for the Fourth Circuit, State of Louisiana. Judgments were rendered against the City and has been reported in 230 So.2d 326. Rehearing denied February 2, 1970. Application for writs were filed to the Louisiana Supreme Court and writs were denied at 255 La. 557, 232 So.2d 78.

On August 12, 1970, when another Mayor and other City officials became party defendants, Firefighters sought a rule for contempt for failure to obey the mandamus orders. After the trial, judgments of contempt were rendered. These judgments are not reported. See Appendices G-1, H-1, I-1, J-1. An Appeal was taken to the Court of Appeals for the Fourth Circuit of Louisiana. While this appeal was on file, the Supreme Court of Louisiana rendered its judgment in the matter of *Louisiana Civil Service League, et al vs. Harold E. Forbes, etc., et als*, 258 La. 390, 246 So.2d 800, (29 March 1971) rehearing denied (May 3, 1971), which interpreted Article XIV, Section 15 (I) of the Louisiana Constitution as it applied to another provision of the Civil Service laws. The section of the statutes therein interpreted apply to the servants in the State Civil Service. The statutes herein interpreted apply to the City Civil Service. The City on 13 October, 1971, filed with the Fourth Circuit Court of Appeals, State of Louisiana, a special plea of unconstitutionality under the 14th Amendment of the United States Constitution, as well as under Article XIV, Section 15 (I) of the Constitution of Louisiana, of the Statutes affecting the Ciy Civil Service. See Appendix B.

Judgment was rendered against the City on 4 April, 1972, and is reported at 260 So.2d 779. The City applied for rehearing and rehearing was refused.

Application for writs of certiorari were taken to the Supreme Court of Louisiana and on 29 June, 1972, writs were granted. 262 La. 452 and 453, 263 So.2d 721 and 722.

On November 6, 1972, the Supreme Court of Louisiana handed down its judgment against City. This judgmetn is reported at ..... La. ....., 269 So.2d 194, Appendix K-1.

A rehearing was petitioned for by City, again alleging the unconstitutionality, under the 14th Amendment of the mandamus and contempt judgments against City. The rehearing was denied on 11 December, 1972 A motion for supersedeas and stay of execution and enforcement of judgment was made by City to the Supreme Court of Louisiana and on 15 February, 1973, the stay was granted. The application for writs were then sent to this Court.

F

REASONS FOR GRANTING THE WRIT, ARGUMENT AND AUTHORITIES

The City and the other defendant officials of the City, have maintained that the statutes in question are violative of Article XIV, Section 15 (I) of the Louisiana Constitution. The pertinent part of the Louisiana Constitution reads, as set out in Appendix L-1.

This argument of the City is not without merit. The Louisiana Civil Service League, an organization existing

principally to being a watchdog, so to speak, over the Civil Service Laws of the State, has likewise maintained the position of the City. See the brief amicus curiae of the League filed in this matter in the Court of Appeals of Louisiana, Fourth Circuit, at Appendix A-1.

The City maintains its position is all the clearer in the light of the *Forbes* case, hereinbefore cited, which interpreted this provision of the Louisiana Constitution in the light of certain statutes of the State providing for State Civil Service. The Supreme Court of Louisiana, in granting the writ of certiorari to the City, went into the difference of *Forbes* as it applied to State Civil Service and the City Civil Service as in the instant matter, but did not squarely pass on this difference but referred to this matter as being res judicata by the judgment of the Fourth Circuit Court of Appeals in the mandamus judgment. (269 So.2d 194, 197), (Appendix K-5.)

It is submitted that the Constitution of Louisiana is still violated by the City Civil Service statutes, provided for in this matter. The liberty of the City and the other City officials are threatened by the judgment of contempt in this matter, which judgment goes contrary to the Constitution of Louisiana.

It is submitted that the City of New Orleans and the other defendant officials are aware of the long standing jurisprudence of this Court where the matter at issue is the interpretation of State questions of law by the highest courts of the State. *Central Land Co. vs. Laidley*, 159 U.S. 103, 112, 16 Sup. Ct. 80, 40 L.E.D. 91 (1895); *Ballard v. Hunter*, 204 U.S. 241, 258, 27 Sup. Ct. 261, 51

L.E.D. 461 (1907); *Patterson v. Colorado ex rel Attorney General*, 205 U.S. 454, 461, 27 Sup. Ct. 556, 51 L.E.D. 879 (1907); *McDonald v. Oregon Railway and Navigation Company*, 233 U.S. 665, 670, 34 Sup. Ct. 772, 58 L.E.D. 1145 (1914).

This may very well be where only property values are involved, but where the life or liberty of a person is threatened, it is submitted that the due process and equal protection of laws in the Fourteenth Amendment are a stronger shield to the defendant's liberty and assures this liberty where a State Statute has been erroneously interpreted by a Court of the State. This is in accord with this Court's recent ruling in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, decided by this Court on June 12, 1972, that the liberty of a defendant may not be taken by a Court without that person having counsel to advise him. Certainly, if he has the right to counsel before his liberty is denied him, then neither can a State Court deny him his liberty by an order based on an erroneous interpretation of law.

G

CONCLUSION

In the light of the foregoing, it is submitted, then, that this Court grant the writ of certiorari in this matter to review the judgment of the Supreme Court of Louisiana in accordance with the concepts of liberty and equal protection of the laws set out in the Fourteenth Amendment.

Respectfully submitted

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H

CERTIFICATE

I, Blake G. Arata, hereby certify that a copy of the foregoing petition for a writ of certiorari, has been served on counsel of record for the respondents in this matter, Messrs. C. Paul Barker and Maurice S. Cazaubon, Jr., Attorneys-at-Law, Carondelet Building, New Orleans, Louisiana, by forwarding same to them at the addresses as hereinbefore set out by U.S. Mail, postage prepaid, air-mail when required by the rules of the Court, and deposited in the Post Office in New Orleans, Louisiana, on this ..... day of ....., 1973.

BLAKE G. ARATA
City Attorney
Counsel of Record
for Petitioners

Brief On Behalf Of Louisiana Civil Service League, Amicus Curiae.

COURT OF APPEAL
FOURTH CIRCUIT — STATE OF LOUISIANA

No. 4783

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632

Plaintiff-Appellee

versus

CITY OF NEW ORLEANS, ET AL

Defendants-Appellants

No. 4784

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

Plaintiff-Appellee

versus

CITY OF NEW ORLEANS, ET AL

Defendants-Appellants

No. 4785

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632 JOE SANCHEZ, JOSEPH ELTON VIOLA, LOUIS TRUXILLO, CHARLES SAUTHER, THOMAS KENNEDY AND MAURICE S. CAZAUBON, SR.

Plaintiff-Appellee

versus

CITY OF NEW ORLEANS, ET AL

Defendants-Appellants

BRIEF SUBMITTED ON BEHALF OF LOUISIANA CIVIL SERVICE LEAGUE, AMICUS CURIAE

MAY IT PLEASE THE COURT:

In view of the rather violent opposition by the Respondent to the motion of the Louisiana Civil Service League for leave to file a brief as amicus curiae herein the League will make only a few remarks and await the pleasure of the Court as most of what the League has to say has already been put of record in the earlier phases of this case. It is in the interest of the preservation of a "merit system" in City and State Government that the League appears, and sincerely believes that an error in law exists with respect to the civil service law of this state.

The League has been a "watch dog", so to speak, over the welfare of the salutary principle of a merit system in government and holds no brief against the Firefighters per se. Nevertheless, when a fundamental error of law is apparent in the body of jurisprudence in this State, an error that substantially weakens the merit principle of government, an error that would favor one group of municipal employees over another, an error so far reaching and fundamental that it must be eradicated or otherwise it will destroy what the League believes has been good for our governmental system, then the League feels it is duty bound to make these remarks, and is grateful for permission to file this brief as amicus curiae.

The basic problem to be resolved is an error in the law. *Two* conflicting interpretations have been given to the same *article* of the Louisiana Constitution and only one can be correct. The League has been attempting to show, as amicus curiae, since these cases first were heard

on appeal, and unsuccessfully to date, that the constitution allows but one interpretation.

It should be apparent now, after reading the briefs and pleadings filed in this matter, that the decision in *New Orleans Firefighters Assn. v. City of New Orleans*, 230 So.2d 326 opened Pandora's box, so to speak. "Formulas," "court orders," "longevity," "excess millage," "in-step raises," "salary increases," etc., — all facets of a pay plan for city employees — are now being brought to this Court for a formulation into a pay plan and a decision that should have been worked out, according to the Constitution, by the Civil Service Commission of the City, working through the Department of Personnel, and approved by the Commission Council.

The law is so very clear when it states "There is vested in . . . the appropriate City Civil Service Commissions . . . the authority and power to *adopt*, amend, repeal and enforce rules which shall have the effect of law . . . and "The State and City Civil Service Commissions shall *adopt:*

> "(c) Rules fixing minimum, maximum, and such intermediate rates of compensation as may be necessary, and establishing uniform pay plans and amendments thereof from time to time, according to duties and responsibilities, *on the basis of recommendations* of the Director after consultation by the Director with appointing authorities and the *State* or *municipal* fiscal officer, *as the case may be*, and resort to such other measures of investigation and research as he may deem desirable. In the adoption of a *pay plan* and amendments

> thereof for the State Service, differences in pay in private business and industry and the scarcity of applicants in the different areas of the State may be taken into consideration in fixing the different rates in the different localities and areas. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The rate of any employee at the time the original pay plan takes effect shall not be reduced by such pay plan. *A pay plan*, or amendments thereto, of the State *shall become of-fective* (sic) *only after approval of the Governor;* and a *pay plan* and amendments thereto *for any city shall become effective only after approval by the governing body of said city.*" (Underscoring added) LSA.-Const. Art. 14 Section 15 (I).

Somehow or other this point did not get across on the first hearing of this case before this honorable court. See *Firefighters Assn. v. City of New Orleans*, 230 So.2d 326 (1970). Again in *obiter dicta* the Supreme Court in the very recent case of *Louisiana Civil Service League v. Forbes*, 246 So.2d 800 (Rehearing denied May 3, 1971) erred in failing to note the *exact parallel between these cases, for the law concerning both City and State is identical!* The reason for the error in the 1970 *Firefighters* case which led to the error in *Forbes* will be shown below.

But first it must be pointed out that the *ultimate authority for compensation* is "*effective*" in the case of the State "only after approval by the Governor" and "*ef-fective*" by the "governing body of the said city" (Commission Council) in the case of the City.

Firefighters (1970) is in error and the *Forbes* case only repeated the error apparently without realizing there

isn't any difference. The irony of the *Forbes* case is that appellants *cited* the 1970 *Firefighters* case in support of the same contention *Firefighters* make here, but the Supreme Court distinguished it agreeing with the Judge *a quo* and ruled against the appellants. But, *Firefighters* (1970) is wrong because it holds the City Civil Service Commission "had only the power of *recommendation, while the ultimate authority for adoption of pay plans rested with the City Council*". (Underscoring added). A reading of the Civil Service amendment, supra, clearly shows this is error. In the city the City Council is the governing body that gives final approval — on the State level, the Governor is the final approving authority. Firefighters thus is trying to make a distinction without a difference. This *Firefighers* case (1970) cites with approval a slightly older case involving the same plaintiffs and defendants in *New Orleans Firefighters Assn. v. City of New Orleans*, La. App. 204 So.2d 690 (1967), *and this is where the error began!* In that case the defendants failed to ask for a rehearing and consequently writs were never applied for. The decision in the case is very much contrary to the law. Unfortunately, this case served as the basis for the misunderstanding about the City Commission's powers relative to formulating "*a* pay plan". The first *Firefighters* case (1967) held that "the Commission's authority was to *recommend*, but the authority to approve and adopt the hours of a work week and overtime hours was the ultimate authority of the City Council". (Underscoring added) This Court adopted the language of the trial judge, the Hon. David Gertler which was completely erroneous. Here is the pertinent language in that case at page 693, to-wit:

> ". . . it clearly appears that the governing body of the City must *approve* any 'hours of work' which

> may be *recommended* by the Civil Service *Commission.* The Commission does not have the power to *finalize* the hours of work. They may and should *recommend.* The final and *only* authority to *set* the hours lies within the governing authority of the City." (Underscoring added)

The "hours of work" and "a pay plan" both are adopted by rules (subsection (c), ibid.) of the Commission and become "effective" only after approval by the governing body. Judge Gertler did not recognize the Commission's power to adopt and thus reduced the Commission to a mere recommending agency which in the law it clearly is not.

Hence the error, and unfortunately in its decision in the second *Firefighters* suit (from which grows this action), this Court held again that "the Commissioner's authority was to *recommend*, but the authority to approve and adopt the hours was the ultimate authority of the City Council . . ." (Underscoring added) (see page 330).

It is respectfully submitted that, according to the Constitution, "There is vested in the . . . City Civil Service *Commission* the authority and power . . . to *adopt*, amend, repeal and enforce rules which shall have the effect of law . . . (6) establishing and recommending *hours of work*, provided that the rules establishing the hours of work shall not become *effective* until *approved* by the . . . governing body of this city." LSA-Const. Art. 14 Section 15 (I). That is, the Commission's power is not simply to recommend, it is also "*to adopt*", and of course the same holds true for a pay plan which pay plan is violated by LA-R.S. 33:1992 and LA-R.S. 33:1996.

To reiterate, the Commission doesn't simply have "only power of recommendation" as stated in *Louisiana vil Service League v. Forbes*, Ibid, at page 810, *but like e State Commission* it *adopts* rules and these rules fix nimum and maximum rates, and these rules *"estab-* uniform pay plans". The pay plan then only becomes *ective* after the "approval by the governing body". LSA-nst. Art. 14, Section 15 I(C), supra.

To restate the matter, the error began with the first *efighters* case; it was picked up and compounded in second *Firefighters* suit following the earlier case, and n again repeated in *Forbes*. Since the first *Firefighters* e is based on erroneous reasoning, and all subsequent isions have followed this error, it is now time to correct ne and put the City and the State on the same legal ting as it is impossible to see any difference whatsoever the Constitutional provision cited above insofar as ne is applied to the City and the State despite the at-pt in *Forbes* to do so.

Therefore, we must now differentiate the words that e been so loosely used, words such as "adopt", "recom-nd" and "effective". The first *Firefighters* case said y that the City Council had the authority to "approve" D *adopt the "hours of work"*. This Court says it did with respect to *"a pay plan"* in the earlier *Firefighters* e and re-states this principle again at page 330 of the ond case involving these plaintiffs. The decision in 0 case embellished the 1967 case saying the Council ld "approve and *adopt*". This is wrong as demonstrated ve, the Council only "approves" — but it does not *pt* — it does not adopt "hours of work" and it does

not adopt "*a pay plan*". This is the Commission's work. If indeed this is true then only the Commission can adopt "a pay plan" and the error in the second *Firefighters* decision and the *Forbes* dicta becomes quickly apparent. The City "adopts", the Council "approves". *Ergo*, the decision in *Forbes* as far *as the State is concerned should be the same with respect to the City!*

Before concluding the League would like to cite still one further case which it feels is also applicable and controlling of the issue herein, to-wit: *Sewerage and Water Board of New Orleans v. Barnett*, 225 So.2d 381 (La. App. 1969). Although this Court attempted to distinguish *Barnett* from the second *Firefighters* suit on the facts, it is urged that another look should be given thereto as the *distinction is made on an assumption that was simply not based on facts contained in the record.*

> "We assume that all firemen and the particular *classes* of *firemen* to whom Acts 55 and 57 relate are employees of the Fire Department. In regard to the Sewerage and Water Board, we must assume that it has many employees in classes which are common to many other departments in the city government, such as clerical employees, stenotypists, etc. It was the discrimination against employees in positions of the same class in other departments of the City which we condemned in the Sewerage and Water Board case. We have no such discrimination in this case. The implementation of Acts 55 and 57 of the Extra Session of 1968 will not be discriminatory among employees *of the same class, since they are all firemen and all will* benefit; therefore, the acts are not prohibited." (Underscoring added)

In fact this just isn't the case at all and the assumption is erroneous. Some jobs held by so-called "firefighters" are *identical* to those held by other *fellow* city employees. A "Fire Prevention Inspector's" duties are identical, in the main, with those of a Building Inspector or a Housing Inspector, and a Fire Alarm Dispatcher's duties (another "firefighter") are very similar to a Police Communications Clerk. (All of these job titles and job descriptions are of public record and can be found in these public records of the City Civil Service Commission.

Because of Barnett, then, is is argued that the decision in 230 So.2d and the distinction made at page 332 therein is simply an error. *Barnett* was correct in its reasoning vis a vis the Sewerage and Water Board employees and the *same reasoning should apply in this matter.*

There is a valid constitutional pay plan now in effect for *all* City employees. LA-R.S. 33:1992 and 1996 (Acts 55 and 57 Extra Session 1968), are in conflict therewith in that these acts seek unconstitutionally to vary the legal pay plan, (see *Forbes*, supra) and both acts should be declared unconstitutional just as LSA-R.S. 40:1394 was found unconstitutional and on the same grounds by the *Forbes* case. To allow otherwise not only flies in the face of a clear constitutional mandate, but opens the gates to subsequent litigation of this type, with its myriad complications and interpretations leading to proceedings such as these, where the Mayor and the Councilmen are being subject to contempt proceedings and puts this Court in the position of "establishing a uniform pay plan".

Finally, it is not consistent with jurisprudential principles to allow this anomaly to exist any longer. What is

consitutional for the State must *ipso facto* be consitutional for the City when the identical law is involved.

Respectfully Submitted,

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B-1

Special Plea Of Unconstitutionality

COURT OF APPEAL
FOURTH CIRCUIT — STATE OF LOUISIANA

No. 4783

NEW ORLEANS FIRE FIGHTERS ASSOCIATION LOCAL 632,
JOSEPH A. SANCHEZ AND ROBERT TREADWAY,
Plaintiffs-Appellants

versus

CITY OF NEW ORLEANS, ET ALS,
Defendants-Appellees

CONSOLIDATED WITH

No. 4784

NEW ORLEANS FIRE FIGHTERS ASSOCIATION LOCAL 632,
JOSEPH A. SANCHEZ AND ROBERT TREADWAY,
Plaintiffs-Appellees

versus

CITY OF NEW ORLEANS, ET ALS,
Defendants-Appellants

CONSOLIDATED WITH

No. 4785

NEW ORLEANS FIRE FIGHTERS ASSOCIATION LOCAL 632,
JOSEPH A. SANCHEZ, JOSEPH ELTON VIOLA, LOUIS TRUXILLO,
CHARLES SAUTER, THOMAS KENNEDY AND
MAURICE S. CAZAUBON, SR.,
Plaintiffs-Appellants

versus

CITY OF NEW ORLEANS, ET ALS,
Defendants-Appellees

Appeal from the Civil District Court for the Parish of Orleans,
State of Louisiana, Honorable E. Sanford Levy, Judge,
in Appeal Nos. 4784 and 4785,
Consolidated with No. 4783.

SPECIAL PLEA OF STATE AND FEDERAL UNCONSTITUTIONALITY
FILED BY DEFENDANTS IN APPEAL NOS. 4783, 4784 and 4785.

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SPECIAL PLEA OF UNCONSTITUTIONALITY

Now into Court, through undersigned counsel, comes the defendants, City of New Orleans, the Honorable Moon Landrieu, Mayor of the City of New Orleans, and the Honorables James A. Moreau, Joseph V. DiRosa, John D. Lambert, Peter Beer, Eddie L. Sapir and Philip C. Ciaccio, councilman of the city of New Orleans, all hereinafter referred to as the "City", and now assert that LSA-R.S. 33:1992 and 33:1996 are unconstitutional as violative of 1921 Louisiana Constitution Articles XIV, Sec. 15(I), in view of Louisiana Supreme Court's recent holding in *Louisiana Civil Service League, Et Al v. Harold E. Forbes, Director, Department of Civil Service, Et Al*, 246 So.2d 800, in which the Court declared that the Legislature has no power to enact statutes establishing and regulating compensation and work benefits of Civil Service employees.

Should this Court of Appeals fail to apply the holding of *Forbes* to the instant case at bar, distinctly opposite interpretations of essentially identical provisions of 1921 Louisiana Consitution Article XIV, Sec. 15 (I) will result, thereby denying to the City equal protection of the laws and substantive due process guaranteed the City by the Fourteenth Amendment, Section 1, of the United States Constitution, and Article I, Section 2 of the 1921 Louisiana Constitution.

RESPECTFULLY SUBMITTED:

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CITY ATTORNEY
/s/ FRANK J. VARELA

FRANK J. VARELA
ASSISTANT CITY ATTORNEY
1115 American Bank Building
New Orleans, Louisiana 70130
Attorney for Defendants — City
(522-9383)

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 13th day of October, 1972 served a copy of the foregoing pleadings on counsel for all parties to this proceeding, by mailing the same by United States mail, and first class postage prepaid.

/s/ FRANK J. VARELA

C-1

July 11, 1969 Annual Vacation Mandamus Order

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 494-226 DOCKET 5

DIVISION "D"

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

versus

CITY OF NEW ORLEANS, ET AL.

FILED: DEPUTY CLERK:

JUDGMENT

This cause came on Tuesday, July 8, 1969 to be heard.

Present:

C. Paul Barker
Maurice S. Cazaubon, Jr.
Attorneys for Plaintiffs

Jackson P. McNeely
Beuker F. Amann
Attorneys for Defendants

After hearing the pleadings, evidence and arguments of counsel, the Court considering the law and evidence to be in favor of plaintiffs, New Orleans Firefighters Association, Local 632, Joseph A. Sanchez and Robert Treadaway and all employees of the New Orleans Fire Department similarly situated, and against the defendants, The City of New Orleans, Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans and each of the duly elected councilmen, for the reasons this day assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the rule for mandamus filed herein be and the same is hereby made absolute and, accordingly, let a Writ of Mandamus issue herein commanding the City of New Orleans, the Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans and the seven individuals who comprise the Council, namely, John J. Petre, Maurice A. Landrieu, Henry B. Curtis, Eddie L. Sapir, Clarence O. Dupuy, James A. Moreau and Philip C. Ciaccio, ordering said defendants to implement the provisions of R.S. 33:1996 as amended to provide:

1) A vacation period amounting to eighteen (18) days with full pay for all employees of the Fire Department of the City of New Orleans who are employed less than ten (10) years, but more than one year as of January 6, 1969.

2) A vacation period of eighteen (18) days plus one additional day for each year of service over ten (10) years up to a maximum of thirty (30)

days with full pay for all those employees of the Fire Department of the City of New Orleans who are employed by the City of New Orleans for more than ten (10) years.

3) To appropriate a sum sufficient to pay for these vacation periods.

JUDGMENT READ RENDERED AND SIGNED this 11th day of July, 1969.

/s/ S. SANFORD LEVY
JUDGE

D-1

July 11, 1969 Longevity Mandamus Order

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 494-227 DOCKET 5

DIVISION "D"

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

versus

CITY OF NEW ORLEANS, ET AL.

FILED: DEPUTY CLERK:

JUDGMENT

This cause came on Tuesday, July 8, 1969 to be heard.

Present:

C. Paul Barker
Maurice S. Cazaubon, Jr.
Attorneys for Plaintiffs

Jackson P. McNeely
Beuker F. Amann
Attorneys for Defendants

After hearing the pleadings, evidence and arguments of counsel, the Court considering the law and evidence to be in favor of plaintiffs, New Orleans Firefighters Association Local 632, Joseph A. Sanchez and Robert Treadaway and all employees of the New Orleans Fire Department similarly situated, and against the defendants, The City of New Orleans, Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans and each of the duly elected councilmen, for the reasons this day assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the rule for mandamus filed herein be and the same is hereby made absolute and, accordingly, let a writ of mandamus issue herein commanding the defendants, the City of New Orleans, the Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans and the seven individuals who comprise the Council, namely, John J. Petre, Maurice A. Landrieu, Henry B. Curtis, Eddie L. Sapir, Clarence O. Dupuy, James A. Moreau and Philip C. Ciaccio, ordering said defendants to implement the provisions of Act 132 Section 1 of 1962 which is the 1962 enactment of R.S. 33:1992 and (1) pay to all employees of the Fire Department of the City of New Orleans who have accrued three (3) years consecutive service in the years 1962, 1963, 1964, 1965, 1966, 1967 and 1968, the longevity increase in pay computed on two (2%) percent of the basic salary being received by each of the employees so provided for above as of August 1st of the appropriate year; and, (2) to appropriate a sum sufficient to pay the longevity pay increase as stated above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendants implement the provi-

sions of Act 55 of the Extra Session of 1968 which is the 1968 enactment of R.S. 33:1992 from and after January 1st, 1969, and the defendants (1) pay annually unto the employees of the Fire Department of the City of New Orleans who have accumulated three (3) years consecutive service, as described above, the longevity pay increase on a basis of two (2%) percent of the sum total of base pay and accrued longevity pay, up to and including twenty (20) years service; and (2) to appropriate a sum sufficient to pay these longevity pay increases.

The amount to be appropriated for the longevity pay increases provided for herein are to be determined by an audit of the personnel and pay records of the membrs of the Fire Department of the City of New Orleans, or by such other method as may be ordered by the Court.

JUDGMENT RENDERED AND SIGNED on this 11th day of July, 1969.

/s/ S. SANFORD LEVY
JUDGE

E-1

July 11, 1969 Minimum Salary Mandamus Order

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 494-228 DOCKET 5

DIVISION "D"

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ, JOSEPH ELTON VIOLA, LOUIS TRUXILLO, CHARLES SAUTER, THOMAS KENNEDY AND MAURICE S. CAZAUBON, SR.

versus

CITY OF NEW ORLEANS, THE COUNCIL OF THE CITY OF NEW ORLEANS, JOHN J. PETRE, MAURICE A. LANDRIEU, HENRY B. CURTIS, EDDIE L. SAPIR, CLARENCE O. DUPUY, JAMES A. MOREAU AND PHILIP C. CIACCIO

FILED: DEPUTY CLERK:

JUDGMENT

This cause came on Tuesday, July 8, 1969 to be heard.

Present:

Jackson P. McNeely
Beuker F. Amann
Attorneys for Defendants

C. Paul Barker
Maurice S. Cazaubon, Jr.
Attorneys for Plaintiffs

After hearing the pleadings, evidence and agreements of counsel, the Court considering the law and evidence to be in favor of plaintiffs New Orleans Firefighters Association Local 632, Joseph A. Sanchez, Joseph Elton Viola, Louis Truxillo, Charles Sauter, Thomas Kennedy and Maurice S. Cazaubon, Sr. and all employees of the N.O. Fire Department similarly situated and against the defendants, The City of New Orleans, the Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans and each of the duly elected councilmen, for reasons this day assigned,

IT IS ORDERED, ADJUDGED AND DECREED that the rule for mandamus filed herein be and the same is hereby made absolute and, accordingly, let a Writ of Mandamus issue herein, commanding the City of New Orleans, the Honorable Victor H. Schiro, Mayor of the City of New Orleans, the Council of the City of New Orleans, namely, John J. Petre, Maurice A. Landrieu, Henry B. Curtis, Eddie L. Sapir, Clarence O. Dupuy, James A. Moreau and Philip C. Ciaccio, to implement the provisions of R.S. 33:1992 as amended:

(1) To establish and recognize as the minimum pay for all supervisors of the Fire Alarm System of the City of New Orleans as of the date of this Judgment the sum of $742.00 per month that is a sum which is computed according to the Statute on the basis of 40% above the minimum pay of a fireman.

(2) To establish and recognize as the minimum pay for all assistant supervisors of the Fire Alarm

System of the City of New Orleans and all dispatchers of the Fire Alarm System as of the date of this Judgment the sum of $662.50 per month that is a sum which is computed according to the Statute on the basis of 25% above the minimum pay of a fireman.

(3) To establish and recognize as the minimum pay for all engineer-operators of the Fire Department of the City of New Orleans as of the date of this Judgment the sum of $583.00 per month, that is, a sum which is computed according to the Statute on the basis of 10% above that of the minimum pay of a fireman.

(4) To establish and recognize as the minimum pay for all fire inspectors of the Fire Prevention Division of the City of New Orleans as of the date of this Judgment the sum of $662.50 per month, that is, a sum which is computed according to the Statute on the basis of 25% above that of the minimum pay of a fireman.

(5) The base pay of all employees of the Fire Department of the City of New Orleans shall be raised and upgraded in accordance herewith as of January 1, 1969, the effective date of the above mentioned Statute.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED That the defendants appropriate a sum sufficient to pay these wage increases.

JUDGMENT RENDERED AND SIGNED on this 11th day of July, 1969.

/s/ S. SANFORD LEVY
JUDGE

F-1

Reasons For Judgment, Honorable S. Sanford Levy, Judge, July 11, 1969

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, ET AL

No. 494-226
494-227
494-228

versus

DIVISION "D"
DOCKET: 5

CITY OF NEW ORLEANS, ET AL

The City of New Orleans and the individual defendants in the three above cases — which have been consolidated for trial — has excepted to the petitions on the grounds that the Mayor should be made a party to the suits, and is thus an indispensable party. Defendants have also excepted on the grounds that plaintiffs fail to state a cause or right of action, and that in Suit No. 494-228 plaintiffs have not shown that they are representative of the class which they purport to represent.

With regard to the exception that the Mayor is an indispensable party, the Court is of the opinion that this exception is not well founded for the reason that the defendant-councilmen are the only persons who are authorized by the Charter to appropriate monies. If the Court ordered the council to appropriate the necessary funds to put into effect Acts 55 and 57 of the extraordinary Session of 1968, the council would be forced to do so. If the Mayor vetoed the council's action the council would be forced to pass the necessary resolutions or ordinances over the Mayor's veto, or be in contempt of the Court's orders.

The thrust of the Exceptions of no right and/or no cause of action is based upon the premise that according to the provisions of the Home Rule Charter, under which the City of New Orleans is operated, the Legislature is without power to pass such Acts, and that under the provisions of The City Civil Service Commission, that body is the sole arbitor of what employees should be paid, the vacation period allowed, etc.

The Court is of the opinion that both contentions of the City have been squarely answered by our Appellate Courts in the case of *City of Natchitoches, et al, vs. State of Louisiana, et al*, 221 So. 2d 534, which was decided by the Court of Appeal for the Third Circuit in April of this year, and Writs were denied by the Supreme Court earlier this month, thus stamping its approval on the decision.

In the Natchitoches case the City brought the suit to have the Courts declare Acts 55 and 57 of the Extra Session of 1968 unconstitutional on the grounds that it

violated the Home Rule Charter of the City of Natchitoches as well as the Civil Service provisions relating to firemen and other municipal employees.

The Appellate Court held that the Acts did not "offend the home rule amendment of our State Constitution", and that they did not "offend the municipal firemen's civil service provisions of the State Constitution."

The argument of the City, that the Home Rule Charter provisions of the Constitution relative to the City of New Orleans are different from that under which the City of Natchitoches operated, is without merit. While the wording is somewhat different, the meaning is the same.

The Constitutional Home Rule Amendment with reference to the City of New Orleans provides that:

> "The City of New Orleans shall, however, not exercise any power or authority which is inconsistent or in conflict with any general law." (Article XIV, Section 22).

while the provision regarding the Home Rule Charter under which the City of Natchitoches operated provided that:

> "* * * any general laws passed by the Legislature shall be paramount and no municipality shall exercise any power or authority which is inconsistent or in conflict therewith."

The only difference the Court can discern is that in the latter instance the words "any general laws passed

by the Legislature shall be paramount" are used. However, if the City of New Orleans is prohibited from exercising any power or authority which is in conflict with any general law passed by the Legislature, then it is obvious that such laws are "paramount."

In the Natchitoches case the Court held that Acts 55 and 57 of the Extra Session of 1968 were "General Laws", hence they govern and must be obeyed by the City of New Orleans.

The argument that the Acts 55 and 57 violate the provisions of the City Civil Service Commission were effectively answered in the Natchitoches case, wherein it stated that "* * * the Legislature may adopt general laws specified as intended to make more effective the aims of municipal civil service protection for firemen and policemen." The City Civil Service Commission is actually without power to do other than to make recommendations to the governing body of the City of New Orleans, i.e., the Council, hence, if the Legislature had the right to require the council to do that which the Legislature provided by a General Law, the council would have no right to take the position that the recommendation of the Civil Service Commission took precedence over the will of the Legislature.

The Court is not unmindful of the burden which may be placed upon the City, and ultimately upon the taxpayers, in order to carry out the Legislative mandate as covered by Acts 55 and 57 of the Extra Session of 1968, but it is not this Court's function to do other than to follow the laws as written and interpreted by our Appellate Courts.

The City's contention that in Suit No. 494-228 the plaintiffs have not made sufficient allegations to establish or substantiate the fact that they represent the class they purport to represent, in order to make the suit a class action, is without merit. The evidence introduced to refute the City's exception, which is one of no right of action, clearly shows that the plaintiff, New Orleans Firefighters Association Local 632, actually represents 96% plus of the uniformed firemen of all classes and categories.

For the reasons hereinabove set forth, the exceptions filed by the City in all three cases will be overruled.

ON THE MERITS

Having overruled the exceptions, the Court is unable to do other than to grant the Writs of Mandamus as prayed for by the plaintiffs in the cases.

The evidence offered by plaintiffs is sufficient to show that the City has not done that which it has been required to do under the provisions of Acts 55 and 57 of the Extraordinary Session of the Louisiana Legislature of 1968, and the defendants have not offered any evidence to refute this fact.

Hence, that which the defendants, the members of the City Council, are required to do under the provisions of Acts 55 and 57 becomes a ministerial duty which the Court, under the circumstances, (and especially in view of the decision in the hereinabove cited Natchitoches case), must compel them by Mandamus to do.

For the reasons herein stated, there will be Judgment in each of the three cases as prayed for by the plaintiffs.

New Orleans, Louisiana,
on this 11th day of
July, 1969.

/s/ S. SANFORD LEVY
JUDGE

N.B. Plaintiffs have stated that they would amend their petitions to make the Mayor of the City of New Orleans a party to the three suits, making the exceptions of indispensable party a moot question.

G-1

Judgment, Honorable S. Sanford Levy, November 27, 1970 On Contempt Motion In Annual Vacation Case

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NEW ORLEANS FIREFIGHTERS ASSOCIATION
LOCAL 632, JOSEPH A. SANCHEZ AND
ROBERT TREADAWAY

No. 494-226

versus DIVISION "D"

DOCKET: 5

CITY OF NEW ORLEANS, ET AL

JUDGMENT

The Rule for Contempt, filed herein by plaintiffs against the defendants, on August 12, 1970, came on for hearing on the 19th day of October, 1970, and was taken under advisement by the Court.

PRESENT:

MAURICE CAZAUBON, JR., Esq.,
attorney for plaintiffs,
PAUL C. BARKER, Esq.,
attorney for plaintiffs,
FRANK J. VARELA, Esq.,
attorney for defendants.

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after having

taken the matter under advisement for further consideration and adjudication, for the written reasons this day handed down:

IT IS ORDERED, ADJUDGED AND DECREED That the Rule for Contempt, filed herein by plaintiffs, NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ and ROBERT TREADAWAY, be and the same is hereby dismissed.

JUDGMENT RENDERED AND SIGNED in Open Court on this 27th day of November, 1970.

/s/ S. SANFORD LEVY
JUDGE

H-1

Judgment, Honorable S. Sanford Levy, November 27, 1970 On Contempt Motion In Longevity Case

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NEW ORLEANS FIREFIGHTERS ASSOCIATION
LOCAL 632, JOSEPH A. SANCHEZ, AND
ROBERT TREADAWAY

No. 494-227

versus DIVISION "D"

DOCKET: 5

CITY OF NEW ORLEANS, ET AL

JUDGMENT

The Rule for Contempt, filed herein by plaintiffs against the defendants, on August 12, 1970, came on for hearing on the 19th day of October, 1970, and was taken under advisement by the Court.

PRESENT:

MAURICE CAZAUBON, JR., Esq.,
attorney for plaintiffs,
PAUL C. BARKER, Esq.,
attorney for plaintiffs,
FRANK J. VARELA, Esq.,
attorney for defendants.

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after having taken the matter under advisement for further considera-

tion and adjudication, for the written reasons this day handed down:

IT IS ORDERED, ADJUDGED AND DECREED That the Rule for Contempt, filed herein by plaintiffs, NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ and ROBERT TREADAWAY, be and the same is hereby maintained to the extent of finding the defendants, THE CITY OF NEW ORLEANS, THE COUNCIL OF THE CITY OF NEW ORLEANS, in contempt of the Judgment of this Court rendered and signed on July 11, 1969, the said contempt being, however, not willfully committed by said defendants.

JUDGMENT RENDERED AND SIGNED in Open Court on this 27th day of November, 1970.

/s/ S. SANFORD LEVY
JUDGE

See Case No. 494-226 for Reasons for Judgment.

I-1

Judgment, Honorable S. Sanford Levy, November 27, 1970 On Contempt Motion In Minimum Salary Case

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
STATE OF LOUISIANA

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ, AND ROBERT TREADAWAY

No. 494-228

versus DIVISION "D"

DOCKET: 5

CITY OF NEW ORLEANS, ET AL

JUDGMENT

The Rule for Contempt, filed herein by plaintiffs against the defendants, on August 12, 1970, came on for hearing on the 19th day of October, 1970, and was taken under advisement by the Court.

PRESENT:

MAURICE CAZAUBON, JR., Esq.,
attorney for plaintiffs,
PAUL C. BARKER, Esq.,
attorney for plaintiffs,
FRANK J. VARELA, Esq.,
attorney for defendants.

WHEN, After hearing the pleadings, the evidence and the argument of counsel, the Court, after having

taken the matter under advisement for further consideration and adjudication, for the written reasons this day handed down:

IT IS ORDERED, ADJUDGED AND DECREED That the Rule for Contempt, filed herein by plaintiffs, NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ and ROBERT TREADAWAY, be and the same is hereby maintained to the extent of finding the defendants, THE CITY OF NEW ORLEANS and THE COUNCIL OF THE CITY OF NEW ORLEANS, in contempt of the Judgment of this Court rendered and signed on July 11, 1969, the said contempt being, however, not wilfully committed by said defendants.

JUDGMENT RENDERED AND SIGNED in Open Court on this 27th day of November, 1970.

/s/ S. SANFORD LEVY
JUDGE

See Case No. 494-226 for Reasons for Judgment.

J-1

Reasons For Judgment On Contempt Motion, Honorable S. Sanford Levy, Judge, November 27, 1970

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

NO. 494-226
versus DIVISION "D"
DOCKET: 5

CITY OF NEW ORLEANS, ET AL

and

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

NO. 494-227
versus DIVISION "I"
DOCKET: 5

CITY OF NEW ORLEANS, ET AL

and

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ, JOSEPH ELTON VIOLA, LOUIS TRUXILLO, CHARLES SAUTER, THOMAS KENNEDY AND MAURICE S. CAZAUBON, SR.

NO. 494-228
versus DIVISION "A"
DOCKET: 5

CITY OF NEW ORLEANS, ET AL

REASONS FOR JUDGMENT

The above captioned matters were consolidated for the purpose of trial, but the nature of the present proceedings require that they be treated separately.

In 1962 the Legislature enacted Act 132 which amended and re-enacted La. R.S. 33:1992 and 33:1996, and in the extra Session of 1968 the Legislature again amended and re-enacted La. R.S. 33:1992 and 33:1996.

On June 20, 1969, the plaintiffs (hereinafter referred to as "Firefighters") instituted the three above captioned suits against the City of New Orleans, its Mayor and Councilmen (hereinafer referred to as the "City"), seeking to have a Writ of Mandamus issued directing the City to comply with the provisions of La. R.S. 33:1992 and 33:1996, as amended.

In response to these suits, the City strenuously argued that the Acts referred to were unconstitutional for several reasons which were thoroughly briefed and argued before this Court. Except in suit numbered 494-227, the City did not contend that if the Acts were constitutional the City was complying with their respective provisions. On the contrary, counsel for the City stipulated certain matters, as will be hereafter discussed, which clearly indicated that the City was not paying the Firefighters in accordance with the provisions of La. R.S. 33:1992, as amended, nor was it allowing the Firefighters the annual vacation period as provided by La. R.S. 33:1996, as amended. After a trial of the consolidated matters, judgments were rendered on July 11, 1969.

The judgments rendered by this Court were appealed to the Fourth Circuit Court of Appeal, and after affirmation of the said judgments by the Fourth Circuit Court of Appeal, the City sought Writs of Review of the judgments by the Supreme Court. Writs were denied by the Supreme Court, thus making final the judgments of July 11, 1969.

It is "hornbook law" that these judgments are now res judicata, and it would serve no useful purpose to cite authority to this effect.

On August 12, 1970, the firefighters filed a rule in each of the three cases alleging that the City had not complied with the provisions of either of the three judgments of July 11, 1969, and hence that the City was (and is) in contempt of the Orders of this Court (which ordered the City to do that which is detailed in the said respective judgments hereafter discussed).

The rules were not tried during the Summer Session of this Court, but a stipulation was entered into by which the parties agreed to exchange certain plans for "implementation" having for their apparent purpose the possible amicable settlement of the dispute. Notwithstanding the fact that each party to the proceedings did supply the other with certain "implementation" plans, the fact remains that no amicable settlement was reached and the matter was then tried by this Court on the 19th of October, 1970, and time allowed both parties to submit memorandum of their respective contentions. The Court has now reviewed both the testimony taken on the trial of this matter and the very comprehensive and thorough

arguments advanced by both counsel for the Firefighters and for the City.

The City filed an exception of "no cause or right of action" to the Rules for Contempt, and the Firefighters filed a Rule to Strike an implementation plan which was submitted by the City. The latter rule was dismissed by the Court, and the City's exception was referred to the merits.

At this time it may be well to discuss and dispose of the City's exceptions. While C.C.P. Article 225 provides that one bringing a rule for contempt "shall state the facts alleged to constitute the contempt" this Court is of the opinion that the wording of the Rules for Contempt, brought by the Firefighters, is sufficient compliance with the provisions of Article CCP-225. Our courts have held that the purpose of the Article (CCP-225) is to appraise the party charged with contempt of that of which he is so charged. In the instant case it is impossible for the City to say that they did not know why they were being so charged. While the City and the Firefighters may place different meanings to the judgments of July 11th, 1969, the fact remains that the contempt charge had to be understood by the City, otherwise why would it agree to the suggested exchange of "implementation" plans. The very fact that the City has so ably argued that it is in compliance with the judgments contradicts their argument that sufficient facts which would constitute contempt (if proven) were not alleged. It is the opinion of the Court that the exception by the City is not well founded and should be now dismissed.

The question for determination now is whether the City is in contempt of the Orders of this Court.

SUIT NO. 494-228:

In this matter the judgment of the Court ordered the City to pay the Firefighters certain specific monthly compensation amounts based upon a stipulation made by the City's counsel on the trial of the proceedings. It was the Court's understanding at the time, that these figures were arrived at by using the percentages set forth in La. R.S. 33:1992, as amended, and particularly paragraphs (2) through (10) thereof, and considering the pay of a "fireman" to be that pay which he was then receiving. The specific stipulation referred to is to be found on pages 3, 4 and 5 of the original transcript of the trial of July 8th, 1969:

> "We would further stipulate that the minimum salaries in Section 1992 of Title 33 were found by this Court to be applicable, that the minimum salaries fixed for engineers, would be $583, for a supervisor or superintendent of fire alarm system it would be $743, a fire alarm dispatcher would be $662.50 and a fire inspector or fire prevention inspector would be $662.50. We would further like to offer as joint exhibits a full copy of the Civil Service Rules of the City of New Orleans which is identified as joint exhibit No. 4, revised pay plan of the City of New Orleans as amended through May 2, 1962, identified as joint exhibit No. 5, revised pay plan of the City of New Orleans as amended through December 31, 1964 identified as joint exhibit No. 6, revised pay plan of the City of New Orleans as amended through September 1, 1966 identified as exhibit No. 7, and revised pay plan

of the City of New Orleans as amended through March 6, 1969 identified as joint exhibit No. 8.

"We would further like to offer this, this is more or less the outline of the salaries paid of a firefighter selected at random, this is set forth on the document identified as joint exhibit No. 9."

It is the City's present contention that these figures used in the judgment are erroneous and constitute an "error of calculation" and would, under the provisions of C.C.P. Article 1951, be amended by this Court so as to read in the manner in which the City contends the provisions of La. R.S. 13:1992 should be interpreted.

The Court finds no ambiguity in the language of the Order rendered in the Judgment of July 11th, 1969, in this case. The language "* * * that is a sum which is computed according to the Statute on the basis of 25% above the minimum pay of a fireman" does not in any way have reference to the statutory minimum pay of a fireman, but clearly has reference to the fact that the 25% (or other percentages used with reference to the different classes of Firefighers) is that percentage referred to in the Statute.

Being of the opinion that the Orders are clearly expressed, the question is whether or not the act intended that the percentages referred to therein would be of that "minimum" monthly salary of $400.00 set forth in paragraph (1) of La. R.S. 13:1992, or whether the percentages set forth in paragraphs (2) through (10) "above that of a fireman" should be that salary the fireman was receiving as a minimum in the particular place wherein the act was to take effect. (See Note 1, below). This,

then, is certainly a matter of construction and interpretation of the Statute and the calculations used in the judgment, which were based upon the percentage used in the statute "above" the minimum pay which the fireman was receiving at the time, were not an "erroneous calculation." It was, in fact, one which the City by its stipulation considered to be in accordance with its interpretation of the meaning of the provisions of La. R.S. 13:1992. However, irrespective of the validity of any such stipulation made by the City, the Court is of the opinion that the judgment in this case, being res judicata, cannot be amended or changed by this Court, and that the City must comply with the judgments and pay the amounts therein set forth. Inasmuch as the City has not done so (or sought relief from so doing prior to the filing of the Rules for Contempt), the City is in contempt of the said Orders as set forth in the judgment of July 11, 1969.

NOTE 1:

> Clearly, if a fireman was making a minimum salary of $500.00, and the engineer was given an increase of only 10% above the $400.00 minimum, he would have no increase at all, so that the Act would be ineffective as to him.

SUIT NO. 494-227:

The July 11th, 1969, judgment orders the City to implement the pay of the fireman as provided in the last paragraph of La. R.S. 33:1992, as amended by Act 55 of the Extra Session of 1968 which reads as follows:

> "From and after the first day of August, 1962, each member of the fire department who has had

three years continuous service shall receive an increase in salary of two percent and shall thereafter receive an increase in salary of two percent for each year of additional service up to and including twenty years. Both the base pay and accrued longevity shall be used in computing such longevity pay."

It is the contention of the City that it has been in compliance with the said judgment in that it has increased the pay of the fireman in accordance with the provisions of the Civil Service Pay Plan, and on the basis of merit, and that in addition the fireman has been paid an annual sum in distribution of that portion of the 3 mills tax levied in accordance with the provisions of Section 25 of Article 14 of the State Constitution. (See Note 2, below).

On the trial of this matter in 1969 substantially the same contention was made by the City, and thus, as heretofore stated, the judgment of this Court — which rejected that argument — was affirmed and is now res judicata.

Furthermore, it is the opinion of this Court that it must be presumed that when the Legislature enacted Acts 132 of 1962 and Act 55 of the Extra Session of 1968 it was well aware of the Civil Service Pay Plan and of the fact that salaries were increased on a merit basis plan. Certainly the Legislature was aware of the Constitutional provisions, inasmuch as in the first paragraph of Act 132 of 1962 it is provided that in fixing the minimum salaries of firemen the salary would include "salaries payable out of the avails of any special tax provided by the Constitution of Louisiana for increasing the pay of firemen."

NOTE 2:

> An opinion rendered by the Attorney General in 1958-1960, page 130, stated that:
>
> > "The two percent annual increase in salary for firefighters means a two percent increase over salary, which he is presently receiving prior to such increase, and not a two percent increase based on original starting salary."

It is clear that the Legislature intended that firemen be singled out as being especially entitled to the 2% longevity pay *in addition* to those pay increases included in paragraphs (2) through (10) of La. R.S. 33:1992 which included the amount paid to them out of the millage provided by Section 25 of Article 14 of the Constitution. Furthermore, the Legislature in 1968 made it clear that this 2% would, in effect, be compounded annually.

As stated by the Court (First Circuit, Court of Appeal) in *Marshal J. La Fleur, Jr., et al versus City of Baton Rouge*, 124 So. 2d. 374:

> "The Court is not concerned with determination of wisdom of having salaries of firemen fixed by City or Legislature inasmuch as Court adheres to belief that its duty is expressed is maxim: Jus dicere, et non jus dare — to declare the law, and not to make the law."

The Court is therefore of the opinion that there is no merit to the City's present contention that they are in compliance with the Orders of this Court as contained in the Judgment of July 11th, 1969, which Judgment, we repeat, is res judicata.

The Court must accordingly hold the City in contempt of its said Order contained in the Judgment of July 11, 1969.

SUIT NO. 494-226:

The July 11th, 1969, Judgment in this matter traced the provisions of La. RS. 33:1996, as amended by Act 57 of the Extra Session of 1968 which provided for an annual vacation of 18 days for firemen who had served one year and for an increase of one day for each year that firemen had served in excess of ten years, up to a maximum of 30 days.

Here, again, the City argues that it has complied with the provisions of the Order contained in said Judgment, and it has graphically set forth its contention both in the testimony produced on the trial of the contempt rule and in the memorandum which has been submitted in argument.

The record indicates that following the Judgment of July, 1969, the Firefighters began negotiations with the City which resulted in an agreement being made under which a platoon system was adopted which provided for a 56-hour workweek "to be worked on a Three Platoon Basis in the following manner of 24 hours on and 48 hours off". This agreement was voted upon by the Firefighters' Board of Directors in 1969, and approved by a substantial majority of the Membership of the Firefighters' Organization on whose behalf the proposed plan was submitted to the City. As a part of that plan, it is specifically provided that:

"Under the 24-48 hour work schedule a Firefighter would earn 9 twenty-four hour days or 216 hours of work time off per year. He would use 8 annual leave days or 192 hours of this time for vacation purposes which would result in *26 days vacation.* The remaining day or 24 hours are accumulated * * * "

The Court is of the opinion that based upon the plan as proposed by the Firefighters, and agreed to by the City — subsequent to the Judgment of July 11th, 1969 — the firemen are generally receiving the paid vacation provided by La. R.S. 33:1996, as amended.

Certainly there is merit to the City's contention in connection with the defining of the word "days" as contained in La. R.S. 33:1996, as amended, in view of the very nature of the work performed by the Firefighters. And under the circumstances, and especially the agreement entered into between the Firefighters and the City, it is impossible for this Court to hold that the City is in contempt of its Order as contained in the Judgment of July 11, 1969, as respects this suit, and the Rule for Contempt in this suit must be dismissed.

Having held that the City is in contempt of the Orders of this Court as set forth in the Judgments of July 11th, 1969, rendered in the matters Numbered 494-227 and 494-228, the question now posed is that of the authority of this Court to force compliance by punishment or otherwise.

Since the Court has no method at its disposal for the enforcement of any Judgment other than as set forth

in C.C.P. Articles 221 tnrough 227, reference must be made to these Articles.

As set forth in Article 221: "Contempt of Court are of two kinds, direct and constructive".

Certainly the action of the City coud not constitute a "direct contempt" as defined in Article 222, hence as set forth in Article 224 the contempt not being a "direct" one, must be a "constructive contempt". The City's contempt must therefore fall within one of the ten acts of "constructive contempt" listed in Article 224. And the only Act therein set forth which would cover the City's contempt, as found by this Court, is that designated as (2) which reads as follows:

> "*Wilful* disobedience of any lawful judgment, order, mandate, writ, or process of court."

Did the City *wilfully* disobey the orders of this Court?

Although this Court has now found that the City's arguments urged in connection with matters 494-227 and 494-228 are without merit, this finding is to some extent based upon the fact that the judgments rendered are res judicata, and upon the opinion of this Court that the arguments are otherwise without merit for the reasons set forth herein. At the same time the Court cannot but recognize the fact that the arguments have been advanced in good faith, and on the basis of a conscientious belief in their validity. In addition, the Court must take judicial knowledge of that which is common knowledge, namely, the financial condition of the City, and the City's needs

for finding funds with which to supplement the firemen's salaries, as provided by the said Judgments of July 11, 1969, as well as to find funds with which to maintain all municipal services and supplement the pay of all underpaid City employees.

Under all of these circumstances, it is not possible for this Court to hold that the City's contempt was wilful, and failing to so find, the Court is without power to punish.

The Court is of the opinion that having held, as it has herein, that the City's contention that they are in compliance with the Orders of this Court are without merit, failure to comply with the Court's Orders or to have such Orders (and Judgments) modified or changed by appeal, or through other proceedings, within the next ninety (90) days, would place the City in "wilful" contempt of such Orders. Upon a showing so made hereafter, and after a Rule for Contempt is filed, the Court would then be authorized to proceed in accordance with the provisions of C.C.P. Article 227 and La. R.S. 13:4611.

New Orleans, Louisiana,
on the 27th day of
November, 1970.

/s/ S. SANFORD LEVY
JUDGE

K-1

Decision Rendered November 6, 1972

SUPREME COURT OF LOUISIANA

No. 52511

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

versus

CITY OF NEW ORLEANS ET AL.

No. 52519

NEW ORLEANS FIREFIGHTERS ASSOCIATION LOCAL 632, JOSEPH A. SANCHEZ AND ROBERT TREADAWAY

versus

CITY OF NEW ORLEANS ET AL.

On Writ of Certiorari, or Review, to the Court of Appeal, Fourth Circuit, Parish of Orleans, Louisiana

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DIXON, Justice

In June of 1969 the plaintiffs filed three suits against the City of New Orleans. They were consolidated for trial, and judgment was rendered on July 11, 1969

in the trial court. Each petition prayed for a mandamus, ordering the city to implement the provisions of Acts 55 and 57 of the Extra Session of 1968 (No. 494-226 is referred to as "the vacation case;" No. 494-227 is referred to as "the longevity case;" No. 494-228 is referred to as "the minimum salary case.") The trial court overruled exceptions, sustained the demands of the plaintiffs, and ordered the city to comply.

The city appealed and on January 12, 1970 the Court of Appeal affirmed the trial court (see *New Orleans Firefighters Association et al. v. City of New Orleans et al.*, 230 So. 2d 326).

On March 12, 1970 this court denied the application of the city for writs to review the Court of Appeal decision.

On August 12, 1970 plaintiffs filed a motion in the consolidated cases in the district court seeking to have the city, the mayor and the council of New Orleans adjudged guilty of contempt of court for failure to comply with the previous judgment in the mandamus suit. The motion for contempt in 494-226 (the vacation case) was dismissed. The motion for contempt in 494-227 (the longevity case) was "maintained to the extent of finding the defendants, the City of New Orleans, the Council of the City of New Orleans in contempt . . . , the said contempt being, however, not wilfully committed by said defendants." In 494-228 (the minimum salary case), the judgment was rendered against the city in the same words as those used in 494-227.

The firemen and the city both appealed the adverse judgments The judgments of the district court which

found the city in contempt were reversed. The judgment of the district court in the vacation case, which found the city was not in contempt, was affirmed. (*New Orleans Fire Fighters Association Local 632 et al v. The City of New Orleans et al.*, 260 So. 2d 779).

In the longevity and minimum salary cases, the Court of Appeal held that "wilful disobedience is an essential ingredient of the contempt itself and without such a finding there can be no finding of constructive contempt." 260 So.2d 779, 786. This was the only ruling of the district court with which the Court of Appeal disagreed. The Court of Appeal agreed with the district court that the city's failure to comply with the court's prior judgment did not constitute "wilful" disobedience. Upon this finding, the Court of Appeal remanded the longevity and minimum salary cases for the trial court to set a reasonable time within which to comply, or face contempt proceedings "as authorized in LSA-C.C.P. art. 225 et seq."

Whereupon, both plaintiffs and defendants applied to this court to review the judgment of the Court of Appeal. Because the matter was clothed with a great public interest, and because both parties requested clarification of the issues between them, we granted writs on June 29, 1972.

The principal argument upon which the city bases its claim for relief from the judgments in the mandamus suits ordering the city to comply with the provisions of Act 55 (amending R.S. 33:1992) and Act 57 (amending R.S. 33:1996) of the Extra Session of 1968 and Act 132

of 1962 (which also amended R.S. 33:1992) arises because of an apparent conflict between a decision of this court and the 1970 decision of the Court of Appeal affirming the trial court in the mandamus suits. (*New Orleans Firefighters Association Local 632 et al. v. City of New Orleans et al.*, 230 So. 2d 326).

In March of 1971 this court decided *Louisiana Civil Service League et al. v. Forbes et al.*, 258 La. 390, 246 So. 2d 800. In the *Forbes* case the trial court had held Act 33 of 1970 unconstitutional as violative of Article 14, Section 15 of the Louisiana Constitution. Act 33 of 1970 purported to establish certain minimum salaries for the state police. The trial court was of the opinion that the salaries of all employees who are under civil service were governed by the civil service amendments to the Louisiana Constitution.

Because the district court had found an act of the legislature unconstitutional, we were required to review the matter. We held that "Act 33 of 1970 is not supplementary to the Civil Service Amendment; it is in conflict with it because it ascribes to the Legislature a power which was taken away from it by the electorate's adoption of a constitutional amendment . . ." (246 So.2d at 808).

We also referred to *New Orleans Firefighters v. City of New Orleans*, supra, and found that case not controlling. We quoted with approval from the district court's opinion where the cases were distinguished on the basis of the difference in the relationships among state police, the state civil service commission, the legislature and the

governor, on one hand, and the firemen, the city civil service commission and the city council on the other.

The great and apparent similarity between the cases arising from legislative efforts to increase the pay of the state police and that of the firemen, since both are controlled by the same constitutional provision, furnishes the substance of the city's defense. Because this court found in the *Forbes* case, supra, that the legislative efforts to raise state police pay conflicted with Article 14, Section 15 of the Louisiana Constitution, argues the city, it must follow that the legislative efforts to increase the pay and benefits of firemen are also unconstitutional.

RES JUDICATA

That question, however, is not before us. The judgment in *New Orleans Firefighters v. City of New Orleans*, 230 So.2d 326 (1970) has became final. The City of New Orleans is now barred by "the authority of the thing adjudged" (C.C. 2286) from defending on the basis of the unconstitutionality of the legislative acts involved.

The 1970 Court of Appeal decision in those cases affirmed the judgments of July 11, 1969 of the district court, and became final and executory upon the denial by this court (255 La. 557, 232 So.2d 78) of applications for writs of certiorari. C.C.P. 2167; Article 7, Section 11, Louisiana Constitution. The district court had rendered judgments in favor of the firemen plaintiffs and against the city defendants.

In No. 494-226 the district court ordered the defendants to implement R.S. 33:1996 as to vacations and to

appropriate a sum sufficient to pay for the vacation periods.

The district court judgment in No. 494-227 ordered the defendants to implement R.S. 33:1992 as to longevity pay increases and to appropriate the necessary funds.

In No. 494-228 the defendants were ordered to implement the pay provisions of R.S. 33:1972 "as of January 1, 1969," and to make the necessary appropriation.

In spite of the finality of the 1970 Court of Appeal judgment, when plaintiffs sought to enforce the judgments by contempt proceedings the defendants again argued the unconstitutionality of the amendments to R.S. 33:1992 and 1996. The constitutional issue had been raised by defendants in the district court in the mandamus actions and decided adversely to them there and in the Court of Appeal.

To meet the constitutional defense, plaintiffs rely upon the authority of the thing adjudged. *Res judicata* is available to plaintiffs. See *State v. American Sugar Refining Co.*, 108 La. 603, 32 So. 965 (1902); O'Quin, Res Judicata—"Matters Which Might Have Been Pleaded," 2 La.L.Rev. 347, 360 (1939-1940).

The essential elements of *res judicata* are described in C.C. 2286:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same par-

ties, and formed by them against each other in the same quality."

The parties before us are the same and are here only because the district court and Court of Appeal have found that the defendants have failed to carry out, in two cases, the judgments rendered against them on July 11, 1969. The demand in the contempt actions is "founded on the same cause of action." The "object of the judgment," the "thing demanded," the *"cause,"* is the same—the implementation of R.S. 33:1992 and 1996. As Pothier says, "It is the same horse."'

In *State v. American Sugar Refining Co.*, supra, the State sued to collect license taxes for 1900 and 1901 under Act 171 of 1898. The defense raised was an exemption for "manufacturers" under the Constitution. The plaintiff filed a plea of *res judicata* based on a previous suit for taxes claimed to be due for the year 1898 and previous years. The defense in the prior suit was that Act 150 of 1890 (virtually the same as Act 171 of 1898) was not applicable to defendant, who enjoyed the constitutional exemption as a manufacturer. The State won the earlier suit when the Supreme Court held that the defendant sugar refiner was not a "manufacturer." *State v. American Sugar Refining Co.*, 51 La. Ann. 562, 25 So. 447. The State lost the later suit when the court overruled the plea of *res judicata* and held that the refiner was a manufacturer.

The reason given in *State v. American Sugar Refining Co.*, supra, for overruling the exception of *res judicata* was that the thing demanded and the cause of action were

not the same in the two suits. Examples given by the court illustrate the correctness of its conclusion.'

In the case before us, the identity of the parties, the thing demanded and the cause require the sustaining of plaintiffs' plea of *res judicata*. As between these litigants, we will not again inquire whether R.S. 33:1992 and 1996 violate Article 14, Section 15 of the Louisiana Constitution of 1921.

> "The basic principle of res judicata is found in the necessity that a time should come when the litigation shall cease, in order that the decree of the court may be carried out. This is what the law concerns itself with, that the object of the judgment shall not remain eternally in suspense, but be delivered into the quiet and undisturbed possession of the successful litigant. This is what the Code means when it says that 'The authority of the thing adjudged takes place only with respect to what was the object of the judgment.' " 32 So. 966.

PRESCRIPTION

We do not now decide whether *res judicata* prevents the consideration of defendants' plea of prescription.' Prescription was not pleaded in the mandamus suit. Prescription was not pleaded in the contempt proceedings, until in the Court of Appeal.

Prescription must be specially pleaded; the court cannot supply the objections of prescription. C.C.P. 927. It may be pleaded in the trial court prior to submission (C.C.P. 927) and in the appellate court "if pleaded prior to a submission of the case for a decision . . ." C.C.P. 2163. In these cases the plea of prescription was not filed

by defendants until October 4, 1971, in the Court of Appeal in the contempt proceeding. The defendants chose not to raise the defense of prescription until long after the judgments in the mandamus suits became final. Now it comes too late for consideration. This contempt action is in the same suit as the original mandamus suit, and is merely an effort by the successful plaintiffs to enforce their judgment. The city cannot now urge a defense which it has tacitly waived.

This conclusion is compatible with the only analogous case found in Louisiana. In *State v. Clinton and Port Hudson Railroad Co.*, 21 La. Ann. 156 (1869), there was a contest between a creditor and the liquidator of the defendant railroad over interest on the creditor's claim which extended over a period of several years. Early in the liquidation proceedings the railroad's commissioners had filed an accounting. The creditor Hawford filed an opposition because no interest had been allowed on his claim. There was a judgment on February 11, 1854 dismissing the opposition and homologating the account.

When the final account of the liquidator was filed, Hawford again opposed the account, and obtained a judgment for $500.00 **with 8 per cent interest**, and privileged rank. The judgment was obtained on November 26, 1858. There was no appeal and the judgment became final.

Then on June 7, 1867 Hawford ruled in the liquidator to show cause why Hawford's judgment should not be paid as a privileged claim, to which the liquidator pleaded the judgment of February 11, 1854 (which ruled against the claim for interest) as a bar. The ruling of the Supreme Court was:

> "The judgment of the eleventh of February, 1854, might have been used as a defense against the allowance of interest on the trial of the opposition to the liquidator's account in 1858. It cannot be set up now. The defendant will not be permitted to go behind that judgment and urge the defense which should have been made at the time."
> 21 La. Ann. 156.

Our procedural statutes prevent the defendants, in this contempt action which seeks to enforce a final judgment, from pleading prescription, a defense available to them in the mandamus suit but not urged.

LACHES

The city argues that plaintiffs are precluded by "laches" from recovery on certain of their demands.

The first time defendants raised the defense of "laches" was in the city's "Implementation Plan" filed in the district court September 28, 1970 in compliance with a stipulation between plaintiffs and defendants filed August 27, 1970 in the contempt proceedings. As an alternative to defendants' plea that the city was in compliance with R.S. 33:1992 and 1996, the "Implementation Plan" concluded with a contention that it should be relieved of responsibility for payment of longevity pay increases prior to July 20, 1969, when these suits were filed, because of "the failure of plaintiffs . . . to assert their claims . . . prior to the filing of suit." No other factual allegation is made.

Defendants do not complain that the contempt proceeding came too late, but that plaintiffs made their original demands in the mandamus actions too late. Defend-

ants cannot, in a contempt action to enforce a final judgmet, raise the defense that plaintiffs were guilty of laches in obtaining that final judgment.

"Laches" is an affirmative defense which must be specially pleaded. C.C.P. 1005. See *Deposit Guaranty National Bank v. Shipp*, 252 La. 745, 214 So.2d 129 (1968).

PEREMPTORY EXCEPTIONS

Defendants contend that their peremptory exceptions to the rule to show cause should have been sustained, citing *Louisiana State Board of Medical Examiners v. England*, 252 La. 1000, 215 So.2d 640 (1969). In the *England* case it was only alleged in the contempt rule that the defendant "failed to comply with the permanent injunction." This was held to be insufficient to comply with the requirements of C.C.P. 225 that the "rule to show cause . . . shall state the facts alleged to constitute the contempt."

There is no similarity between the pleadings in the *England* case and the pleadings before us. Plaintiffs' motion for the contempt rule was articulated, containing fifteen paragraphs. In the *England* case, the defendant was accused of performing certain acts which violated an injunction which prohibited his practicing medicine or chiropractic. In the case before us, judgments had been rendered ordering the defendants to perform certain administrative acts (providing for certain vacation periods, pay certain longevity pay increases, establish certain minimum pay standards, and to appropriate the necessary funds). The refusal of the defendants to comply with the orders of the court was specifically described in detail. The entire motion and order were served on each defendant,

and adequately complies with the requirements of C.C.P. 225. The peremptory exceptions were properly overruled.

The city argues before us that the longevity judgment of July, 1969 is "ambiguous and open to good faith interpretation." The argument is based primarily on the contention that the computation of longevity in R.S. 33:1992 is based on "basic salary" and "base pay" of firemen. The city agrees that "basic salary and "base pay" are synonymous, but argues that the city is entitled to certain "credits" in implementing the longevity pay, particularly excess millage payments under Louisiana Constitution Article 14, Section 25.

The Court of Appeal referred to the city's argument that it had complied with the pay raise judgment and the longevity judgment as follows:

> "We find it unnecessary at this time to discuss these issues in great detail except to say that they were based both upon the evidence in the present proceeding and upon the principle of res judicata applying to the previous judgments. An examination of the record discloses ample basis for these findings." (260 So.2d at 784).

The trial judge, in his reasons for judgment after the trial on the rule for contempt, referred to the city's argument as follows:

> "On the trial of this matter in 1969 substantially the same contention was made by the city, and thus, as heretofore stated, the judgment of this Court—which rejected that argument—was affirmed and is now res judicata."

Our examination of the record in the mandamus suit and in the contempt suit affirms the correctness of this finding of the trial judge. The pay plans introduced in evidence in the mandamus suit and the pay plans introduced by the city in the contempt suit are the same. The trial court ruled in the mandamus suit that the city was not in compliance with the statutes. The city does not contend that it made any change in the pay plans in the interim between the mandamus suits and the contempt actions. Its argument now is that the district court was wrong in the mandamus suit, and that the city is actually in compliance with the statute.

The city's interpretation of the statute will not save it from conviction of contempt of the final judgment of court. The city is accused with the violation of the **judgment.** Its interpretation of the statute was adjudicated and disapproved in the mandamus suits. The Court of Appeal was correct in finding that the city had not complied with the judgment in the longevity case.

MINIMUM SALARY

The city filed a "motion to correct errors" in the judgment in the minimum salary case, and complains that the Court of Appeal failed to rule upon it.

The city's motion to correct errors is merely an argument that the minimum salaries in the judgment of the district court for the various classifications were based on the actual salary then being paid to a "fireman" instead of the statutory minimum monthly salary of a "fireman" fixed in R.S. 33:1992. The minimum salary statute contained ten classifications of firemen. It fixed

the monthly minimum salary of a "fireman" in subsection (1) of R.S. 33:1992 at $400.00 a month. For each subsequent classification (for engineers, lieutenants, captains, various chiefs, etc.) the minimum monthly salary was fixed at not less than a certain percentage above that of a fireman. For example, subsection (3) provides "Lieutenants shall receive a minimum monthly salary of not less than fifteen percent above that of a fireman." If there was ever any question about the interpretation of a basis for the minimum monthly salaries for various classifications in the fire department, it was put to rest by the stipulation of the city (*Placid Oil Co. v. A. M. Dupont Corp.*, 244 La. 1075, 156 So.2d 444 (1963)) at the trial of the mandamus rule on July 8, 1969. The attorney for the city stipulated that if the court found the minimum salaries in R.S. 33:1992 to be applicable, "that the salaries fixed for engineers would be $583, for a supervisor or superintendent of fire alarm system it would be $742, a fire alarm dispatcher would be $662.50 and a fire inspector or fire prevention inspector would be $662.50."

The stipulation removes any possibility that the "calculations" in the mandamus judgment are erroneous. *Res judicata* prevents the defendants from renewing their argument in opposition to the judgment. It prevents the further litigation of the city's interpretation of the minimum salary schedule between these plaintiffs and these defendants.

The city advances an alternative argument that it is in compliance with the judgment. Again, the city simply argues that the minimum pay plan should have been

based on the minimum salary of a fireman fixed in the statute, rather than on the actual salary of a fireman. The city does not pretend that it is paying the schedule set out in the judgment of July 11, 1969. It cannot be in compliance with the judgment.

VACATIONS

The firemen complain that the Court of Appeal erred in affirming the trial court's finding the city in compliance with its July 11, 1969 judgment concerning vacations.

That judgment ordered the city to implement the provisions of R.S. 33:1996 to provide:

> "1) A vacation period amounting to eighteen (18) days with full pay for all employees of the Fire Department of the City of New Orleans who are employed less than ten (10) years, but more than one year as of January 6, 1969.
>
> "2) A vacation period of eighteen (18) days plus one additional day for each year of service over ten (10) years up to a maximum of thirty (30) days with full pay for all those employees of the Fire Department of the City of New Orleans who are employed by the City of New Orleans for more than ten (10) years.
>
> "3) To appropriate a sum sufficient to pay for these vacation periods."

The judgment is couched in the terms of the statute itself which provides:

> "Firemen . . ., after having served one year, shall be entitled to an annual vacation of eighteen days

> with full pay. This vacation period shall be increased one day for each year of service over ten years, up to a maximum vacation period of thirty days, all of which shall be with full pay. . . ." (R.S. 33:1996, as amended by Act 57 of 1968).

The previous statute had provided for "an annual vacation of fifteen days with pay."

Because firemen work in shifts (which vary from city to city) and because of variations in practice in using vacation time on a piecemeal basis, the firemen contend that the city has failed to properly interpret the judgment ordering compliance with the new vacation law.

The trial court's opinion was that the change in the work schedules agreed upon by the firemen and the city subsequent to the July, 1969 judgment resulted in the initiation of a vacation plan which substantially complied with the requirements of the statute, and that the court could not hold the city in contempt for non-compliance. The Court of Appeal affirmed and approved the district court's interpretation of the word "day" in R.S. 33:1996 and in the judgment of July, 1969. Because the statute was a general statute, applicable to various fire departments throughout the State, the definition of "day" in the vacation statute must be understood in its "most usual signification." C.C. 14. The construction approved by the Court of Appeal was that vacation days in the statute meant calendar days, and not another kind of day (like "work day") which might result in a variation in the application of the statute.

The firemen contend that counsel for the city stipulated, upon the trial of the mandamus suit on July 8,

1969 that the word "day" in the statute meant "working day."

An examination of the record discloses that the attorney for the defendants, prior to beginning the trial of the mandamus suits, made certain stipulations, and there was the following reference to vacations:

> ". . . We would further stipulate that the firemen are permitted 18 days vacation annually in accordance with Civil Service Rule 8, and we have a document . . . concerning the annual leave for firemen. . . ."
>
> "Mr. Barker: Mr. McNeely, would you be willing to stipulate that the days referred to in Statute means working days?"
>
> "Mr. McNeely: Yes. It says that in the Civil Service Rule, it does refer to working days."

The preceding colloquy is not an unequivocal stipulation by counsel for the city admitting that the statute (R.S. 33:1996) was to be interpreted in the same way in which the attorney for the firemen sought to have the courts interpret it. Neither the meaning nor significance of the question is apparent from the record; nor does the answer seem to be exactly responsive. Testimony adduced seems to establish that firemen were receiving in July, 1969 eighteen days vacation (the minimum after one year's service) but that none of the uniformed men in the fire department received more than eighteen days. Those eighteen days were, according to the witness, "working days," but no further elaboration was given.

Nor is the significance of this testimony clarified in the record. This opinion would only be burdened with an

exposition of the possible interpretations applicable to the shift plans of New Orleans firemen. It is sufficient to note that the trial judge who ordered defendants to comply with the statute later found the city in substantial compliance with the judgment.

There is no indication in the record before us, and none from the statute itself, that the legislature intended anything other than calendar days in R.S. 33:1996, when it established a minimum of eighteen days vacation for a fireman with one year's service, with an increase of one day for each year of service over ten years, to a maximum of thirty days.[1]

Consequently, we find no error in the ruling of the district court and the Court of Appeal, holding that the defendants are not in contempt of court for violating the judgment of July 11, 1969 in the vacation case.

CONTEMPT FINDING

The plaintiffs specify that the Court of Appeal erred in finding that "wilful conduct" is necessary before the defendants could be held in contempt. Nevertheless, in their application to us for writs and in brief, the plaintiffs interpret the instructions of the Court of Appeal to the trial court as being identical with the trial court's conclusion on the contempt rule.

In its reasons for judgment of November 27, 1970, the trial court concluded:

> "The Court is of the opinion that having held, as it has herein, that the City's contention that they

> are in compliance with the Orders of this Court are without merit, failure to comply with the Court's Orders, or to have such Orders (and Judgments) modified or changed by appeal, or through other proceedings, within the next ninety (90) days, would place the City in 'wilful' contempt of such Orders. Upon a showing so made hereafter, and after a Rule for Contempt is filed, the Court would then be authorized to proceed in accordance with the provisions of C.C.P. Article 227 and La. R.S. 13:4611."

In every respect, except actually finding the city in contempt, the Court of Appeal afirmed the trial court. It reversed the contempt decree and remanded the case to the trial court "to fix a reasonable period of time for defendants to comply with the judgments of July 11, 1969, after which, should they fail to comply, further contempt proceedings may be invoked as authorized in LSA-C.C.P. arts. 225, 226, 227, and LSA-R.S. 13:4611." (260 So.2d at 788).

We agree with the plaintiffs that the judgments of the district court and the ruling of the Court of Appeal are substantially the same. Consequently, the judgment of the Court of Appeal in each case (No. 494-226, No. 494-227 and No. 494-228) is affirmed. The costs in suit No. 494-226, the vacation case (No. 52511 in this court), are to be borne by the plaintiffs; the costs in No. 494-227, the longevity case, and No. 494-228, the minimum pay case (No. 52519 in this court), are to be borne by defendants.

"§IV. That it is immaterial whether the Demand be made in the same or a different Form of Proceeding. . . .

"[50] Provided the three things, which are mentioned in the preceding paragraphs concur, the authority of res judicata equally attaches, whether the demand is made in the same form of action or another. . . .

"Several instances may be stated of this principle; suppose, for example, you proceed against me by the action quanto minoris, to obtain an abatement in the price of a horse, which you allege to have a certain fault against which I have warranted him, it is decided that the horse has not that fault, or that the warranty did not extend to it, and the demand is dismissed; if you afterwards institute another action against me to rescind the sale, on account of the same fault, I may oppose the exception rei judicatae, although the new demand is made in a different form, and aims at a different conclusion, the three requisites already mentioned concur, it is the same horse, eadem res, there is also eadem causa petendi, for the question in both cases is, whether I have warranted against the fault which you complain of and the question is between the same parties, the difference of the actions, and of the conditions, does not prevent their having the same object and being eadem res. . . ." 1 M. Pothier, Treatise on the Law of Obligations, Part IV, Chapter III, Section III, Article IV, Section 3 (1826).

Quarles v. Lewis, 226 La. 76, 75 So.2d 14 (1954) reconciles this State's jurisprudence regarding *res judicata*, firmly establishing that it is the **civilian** doctrine, and not the common law doctrine of *res judicata* that Louisiana applies.

"'The thing adjudged takes place only with respect to what forms the object of the judgment; and where the defendant contents himself with resisting the demand of the plaintiff, no matter on what ground, the object of the judgment continues to be the demand of the plaintiff. That particular demand, whether allowed or rejected, can never again be urged, but the fact of its allowance or rejection, no matter on what ground, cannot preclude the bringing forward of

another and distinct demand, no matter how closely similar. If I break my neighbor's fence, and to his suit for damages I plead the nonexistence of any law subjecting me to pecuniary liability in such a case, and the day after being cast in the suit I break the fence again under circumstances exactly similar, and another suit ensues, there will be as close identity between the two suits as between two suits for the taxes for different years; but we imagine no one would think of applying the law of res judicata to the second suit. If, however, in the first suit, instead of confining myself to denial of plaintiff's claim, I set up an independent right, justifying my conduct, as that I am owner of the fence in question, or that I have by contract the right to break said fence, then, as a matter of course, as to this defense, if again set up in the second suit, there would be res judicata; but the reason would be that, while urged as a defense, this claim of right would in reality be a demand brought by way of reconvention. I should, pro hac vice, have ceased to be defendant and become plaintiff; and the necessary feature of identity of demand in the two suits would be presented. Exactly when and under what circumstances the defense to a suit passes from the stage of negation, and enters upon that of affirmance, so as to constitute a new demand injected into the suit by way of reconvention, it is not always easy to tell."

In the appropriate case we might be required to decide whether the same "might have been pleaded" standard will be applied to plaintiff and defendant. Plaintiffs are not prohibited by *res judicata* from bringing a second action against the same defendants on the same subject matter if the **cause** is different. Is the application of *res judicata* to be determined solely by **plaintiffs'** cause? That is, if all the juridical facts are placed in evidence and all issues decided on those facts, will the unsuccessful defendant be allowed subsequently to raise a legal defense not pleaded, not placed at issue and not decided in the first suit? Or will the defendant be allowed to raise in subsequent litigation a defense he might have urged without the introduction of new evidence?

Or, must we decide, as suggested in *State v. American Sugar Refining Co.*, supra, and 2 La. L.Rev. 516, whether the **defense** raised in the second suit becomes a **cause**, which, if not identical to the defendant's **cause** in the first suit, might be raised by him in the second? Note that in Justice Provosty's fence-breaking example, the plaintiff's cause is always different in the first and second suits; there are two different torts, each based on a different destruction of the same fence. Yet, when the defense in the first suit is a **cause** (a contractual right to destroy the fence) *res judicata* bars the re-litigation of defendant's **cause** in the second suit, in which plaintiff's **cause** is different. Perhaps the mistranslation in C.C. 2286 of **"cause"** to "cause of action" which occurred in 1825 (see 2 La. L.Rev. 491 at 496) was not an inadvertence, in which case *res judicata* might apply **only** when there is an identity of "causes of action," as contrasted to identity of **cause.**

Again—is liberative prescription a **cause** which, if not litigated in the first suit, may be utilized by the defendant in subsequent litigation? *Liles v. Texas Co.*, 166 La. 293, 117 So. 229 (1928) is cited for the proposition that a judgment sustaining an exception of prescription bars any subsequent suit on the same cause of action. But when there is no plea of prescription in the first suit, can the defendant in subsequent litigation avail himself of this defense, even though he might have raised it successfully under the facts adduced in the first suit?

'Both *res judicata* and prescription are peremptory exceptions, may not be raised by the court and must be specially pleaded. C.C.P. 927.

"'(e) Certain common law concepts enumerated as affirmative defenses in Fed. Rule 8(c), such as accord and satisfaction, **laches,** license, and waiver, have been recognized and adopted in varying degrees by the jurisprudence of Louisiana. They have not been expressly included in the enumeration although to the extent that these concepts

are recognized in our jurisprudence they are included within the omnibus phrase 'any other matter constituting an affirmative defense.'" (Emphasis added). Comment (e) to Article 1005 of the Code of Civil Procedure.

The redactors' comments state ". . . **the motion** for the rule to show cause sets forth the facts alleged to constitute the constructive contempt." (Emphasis added).

The statute provided, of course, that it was not to affect any existing system of vacation computation which would result in greater benefits than those provided in the statute.

CONSTITUTION OF THE STATE OF LOUISIANA

Article 14, Section 15

(I). Rules and regulations; removal of names from lists; delegation of powers. There is vested in the State Civil Service Commission and in the appropriate City Civil Service Commissions for the several cities respectively the authority and power, after public notice and public hearing, to adopt, amend, repeal and enforce rules which shall have the effect of law, regulating employment, transfers, promotion, removal, qualifications, and other personnel matters and transactions, and employment conditions and disbursements to employees, and carrying out generally in the foregoing respects, and as may be otherwise necessary to that end, the provisions and purposes of Civil Service as herein provided, including, but by way of limitation, rules (1) providing for the approval or disapproval of disbursements for all personal services in the Classified Service; (2) establishing work-test periods of not less than six months nor more than twelve months before appointees acquire permanent status as classified employees; provided that no more than three (3) employees shall be removed successively from the same position during their work-test periods without the approval of the Commission; (3) providing uniform regulations covering examinations, maintenance, consolidation and cancellation of eligible lists and the removal of names from an eligible list, leaves of absence, including sick and annual leaves, lay-offs, reinstatements, reemployment, transfers, and abolition of positions; (4) providing for promotions on a competitive basis except where the Commission finds that it is impractical and except where rules have been adopted under the authority and as defined

in (I) (3) (5) and (I) (a); (5) providing for the filling of vacancies in the classified service by demotion, transfer, reinstatement, reemployment, promotion, original appointment or temporary appointment, as such methods are defined, and under the conditions and subject to the restrictions and limitations, including the preference and order of the methods to be used in filling vacancies, set forth in the rules; (6) establishing and recommending hours of work, provided that the rules establishing the hours of work shall not become effective until approved by the governor or governing body of the city, as the case may be; (7) providing for attendance records, conditions for payment of salaries, training and educational programs for persons in the State or City Services, and a uniform service rating system (including the manner in which ratings are to be used in promotions, salary increases, suspensions and separations); (8) fixing the procedure, the time within which appeals must be taken, and all other matters pertaining to appeals; (9) according preferences in original appointments to citizens and registered voters of the State and preferences to citizens and registered voters of the cities subject to the provisions of this Section, and five-point preferences in original appointments and three point preferences in promotions to all persons honorably discharged . . .

. . . The State and City Civil Service Commissions shall adopt:

(a) rules providing for the method of certification of eligibles for appointment or promotion, and the number to be certified, which shall be not less than three except if more than one vacancy is to be filled the name of one

additional eligible for each additional vacancy may be certified, and except that special and different rules may be established in the case of reemployment lists and reinstatement and in the rules defined in (I) (3) (4) and (5), and the rules shall also define and establish such certifications and appointments as are declared and defined by the Commission to be emergency, provisional or conditional appointments or appointments for a limited period where Civil Service status is not obtained and certification not required.

(b) A classification plan, prepared and submitted by the Director or already in existence, requiring the classification of positions in the classified service according to similarity of duties performed and responsibilities assumed, so that the same qualifications may reasonably be required for, and the same schedule of pay may be equitably applied to all positions in the same class. After such classification plan and any amendments of the plan from time to time have been adopted by the Commission, the Director, with the approval of the Commission, shall allocate the positions of every employee in the classified service to one of the positions in the plan. Thereafter, as new positions are created or additional classes are established, or existing classes are divided, combined, altered or abolished, the Director shall make such allocations or reallocations of positions to new or existing classes as are necessitated thereby. Following the adoption of the classification plan and any amendments of the plan, and the allocation to classes therein of positions in the classified service, the class titles set forth therein shall be used to designate such positions in all official records, documents, vouchers and communications, and no person shall be appointed to or employed in a position in the Classified

service under any class title which has not been approved by the Director as appropriate to the duties to be performed.

Employees affected by the allocation or reallocation of a position to a class, or by any changes in the classification plan, shall be afforded a reasonable opportunity to be heard thereon, first by the Director and later by appeal to the Commission after filing with the Director a written request for a hearing.

(c) Rules fixing minimum, maximum, and such intermediate rates of compensation as may be necessary, and establishing uniform pay plans and amendments thereof from time to time, according to duties and responsibilities, on the basis of recommendations of the Director after consultation by the Director with appointing authorities and the State or municipal fiscal officer, as the case may be, and resort to such other measures of investigation and research as he may deem desirable. In the adoption of a pay plan and amendments thereof for the State Service, differences in pay in private business and industry and the scarcity of applicants in the different areas of the State may be taken into consideration in fixing the different rates in the different localities and areas. Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The rate of any employee at the time the original pay plan takes effect shall not be reduced by such pay plan. A pay plan, or amendments thereto, of the State shall become effective only after approval of the Governor; and a pay plan and amendments thereto for any city shall become effective only after approval by the governing body of said city.

REVISED STATUTES OF LOUISIANA

Title 33, Section 1992

§1992. Minimum salaries

The minimum monthly salaries of firemen in municipalities having a population of twelve thousand or more and of all parish and fire protection district paid firemen, including salaries payable out of the avails of any special tax provided by the Constitution of Louisiana for increasing the pay of firemen, shall be in accordance with the following schedule, and such salaries shall be paid semi-monthly not later than the fifth and twentieth day of each calendar month:

(1) A fireman shall receive a minimum monthly salary of four hundred dollars per month.

(2) Engineers shall receive a minimum monthly salary of not less than ten percent above that of a fireman.

(3) Lieutenants shall receive a minimum monthly salary of not less than fifteen percent above that of a fireman.

(4) Captains shall receive a minimum monthly salary of not less than twenty-five percent above that of a fireman.

(5) Battalion chiefs and district chiefs shall receive a minimum monthly salary of not less than forty percent above that of a fireman.

(6) Assistant chiefs and deputy chiefs shall receive a minimum monthly salary of not less than fifty percent above that of a fireman.

(7) A mechanic or assistant mechanic, or any other person doing this type of work for the fire department, shall receive a minimum monthly salary of not less than twenty-five percent above that of a fireman.

(8) A superintendent of fire alarm system, or any other person doing this type of work for the fire department, shall receive a minimum monthly salary of not less than forty percent above that of a fireman.

(9) A fire alarm operator or dispatcher, or any other person doing this type of work for the fire department, shall receive a minimum monthly salary of not less than twenty-five percent above that of a fireman.

(10) A fire inspector shall receive a minimum monthly salary of not less than twenty-five percent above that of a fireman.

From and after the first day of August, 1962, each member of the fire department who has had three years continuous service shall receive an increase in salary of two percent and shall thereafter receive an increase in salary of two percent for each year of additional service up to and including twenty years. Both the base pay and accrued longevity shall be used in computing such longevity pay.

This section will go into effect January 1, 1969.

Amended by Acts 1968, Ex.Sess., No. 55, §1, eff. Jan. 1, 1969.

REVISED STATUTES OF LOUISIANA

Title 33, Section 1996

§1996. Annual vacation

Firemen in municipalities, parishes and fire protection districts to which this Subpart applies, after having served one year, shall be entitled to an annual vacation of eighteen days with full pay. This vacation period shall be increased one day for each year of service over ten years, up to a maximum vacation period of thirty days, all of which shall be with full pay. The vacation privileges herein provided for shall not be forfeited by any member of the department for any cause. Firemen employed on January 6, 1969 shall have their present longevity considered as a factor in the computation of their vacation benefits as provided herein.

The provisions of this section shall in no way be construed to affect in any manner any presently existing system of computing vacation periods under which greater vacation benefits are granted than those provided for herein and the same shall continue in full force and effect.

Amended by Acts 1968, Ex. Sess., No. 57, §1.

Rehearing Refusal of Supreme Court of Louisiana on 11 December 1972

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

New Orleans, 70112

New Orleans, Monday, December 11, 1972.

Court was duly opened pursuant to adjournment. Present Their Honors: E. Howard McCaleb, Chief Justice, Walter B. Hamlin, Joe W. Sanders, Frank W. Summers, Mack E. Barham, Albert Tate, Jr., and John A. Dixon, Jr., Associate Justices:

REHEARINGS REFUSED

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52,511) N. O. Firefighters etc., v. City of New Orleans
52,519)

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I, Andrew J. Falcon, Deputy Clerk, Supreme Court of Louisiana, do hereby certify the above to be a true and correct extract from the minutes of this Court.

IN WITNESS WHEREOF, I hereunto sign my name and affix the seal of the Court aforesaid, at the City of New Orleans, this the 14th day of March, A. D., 1973.

/s/ Andrew J. Falcon
Deputy Clerk, Supreme Court of Louisiana